



Issue Date: 09 April 2009

BALCA Case No.: 2009-TLN-00043
ETA Case No.: C-08333-42584

In the Matter of:

**MARCO, LLC, d/b/a EVERGREEN LAWN CARE
& RAINMAKER IRRIGATION,**
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **JOHN M. VITTON**
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from a request for review of a United States Department of Labor Certifying Officer's denial of an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A (2008) (effective until Jan. 17, 2009); 20 C.F.R. Part 655., Subpart A, available at 73 Fed. Reg. 78,020 (Dec. 19, 2008) (effective Jan. 18, 2009).

Statement of the Case

On November 3, 2008, the Michigan Department of Labor and Economic Growth ("MDLEG") received an application from Marco, LLC, d/b/a Evergreen Lawn Care & Rainmaker Irrigation ("the Employer") requesting temporary labor certification for 20 landscape laborers from March 1, 2009, through November 30, 2009. *See* AF 43-44.¹ The Employer included a temporary need statement describing its need for seasonal landscape workers from April through November. AF 46. The Employer's statement included, in pertinent part, the following:

¹ Citations to the 48-page Appeal File will be abbreviated "AF" followed by the page number.

Our company's need for landscape laborers is seasonal in nature since we cannot perform landscaping services during the winter months. We need additional workers in the [sic] starting in April to perform Spring clean-ups, lawn mowing services, and leaf clean-up's.

In the winter months, starting mid-December, we have about twenty employees, four of those in the office. The other sixteen are our mechanics, snow shovelers and snow plow truck drivers.

From April through November we employ approximately fifty-five people, four of those in the office. We have two mechanics on duty in the warmer months, but the rest of the fifty-some people are out mowing lawns, installing landscape, or installing sprinkler systems.

AF 46. The Employer also attached a payroll summary report for all permanent and temporary landscape laborers employed during 2006 and 2007. AF 47. The report indicates that the Employer employed between eight and ten temporary landscape laborers between April 1, 2006, and October 31, 2006, and again between April 1, 2007, and November 30, 2007. AF 47. The report also indicates that the Employer employed between 16 and 42 permanent landscape laborers throughout 2006 and between 14 and 38 permanent landscape laborers throughout 2007. AF 47.

After submitting its application, the Employer underwent supervised recruitment of U.S. workers, and MDLEG transmitted the application to the Department of Labor's Employment and Training Administration ("ETA"). See AF 29-42. On January 14, 2009, the CO issued a *Request for Information* ("the RFI"). In issuing the RFI, the CO relied upon Training and Employment Guidance Letter No. 21-06, Change 1, Attachment A, Section V.B (June 25, 2007) ("the TEGL").

In the RFI, the CO identified several deficiencies requiring remedial action that are relevant to this appeal.² First, the CO noted that the Employer appeared to have used correction fluid to alter the dates of need listed in Item 18b of the application. Specifically, the CO wrote that the Employer appeared to have written "a date of need originally starting in April 2009 versus March 2009." AF 25. The CO instructed the Employer to resubmit two original application forms and to date and initial any corrections made. AF 25. Second, the CO noted that the Employer did "not adequately explain how its requested dates of need correlate to the dates of need listed" in its application. AF 25. Specifically, while the Employer requested workers beginning March 1, 2009, the statement of temporary need referenced a need for temporary workers beginning in April. AF 25. The CO therefore directed the Employer to submit another statement of temporary need explaining why the job opportunity and number of workers requested reflect a seasonal temporary need for the exact dates requested. AF 25. The CO requested that the statement include "a detailed explanation of the business activities and the duties to be performed by workers in the occupation . . . during each calendar month for which workers have been requested." AF 25.

Third, the CO twice noted that the Employer failed to submit evidence and documentation justifying its temporary need. AF 26, 27. The CO explained that the payroll summary report indicated

² In the RFI, the CO identified an additional deficiency that the Employer corrected and that is not relevant to this appeal. See AF 25, 20.

that the Employer never employed more than 10 temporary workers during 2006 and 2007 and employed none during March of both years. AF 27. The CO also noted that the Employer had been certified for only 18 landscape laborers for 2007 and that the payroll summary report did not justify an increase in the number of workers sought. AF 28. The CO directed the Employer to submit “supporting evidence and documentation that justifies the chosen standard of temporary need” and included the examples listed in the TEGL, Attachment A, Section III.D.4. AF 26. The CO also directed the Employer to submit the documents used in generating the payroll summary report. AF 27. Fourth, the CO wrote that the documentation submitted indicates that the Employer employs permanent landscape laborers year-round and is therefore inconsistent with a seasonal need. AF 27. To remedy this deficiency, the CO again directed the Employer to file a statement of temporary need explaining why the job opportunity and number of workers requested reflect a temporary need that meets one of the regulatory standards of temporary need for the period requested. AF 27.

On January 20, 2009, the Employer filed a response to the RFI. *See* AF 17-22. The response included an amended application form that confirmed the Employer’s requested period as March 1, 2009, through November 30, 2009. AF 21. The response also included a second statement of temporary need, in which the Employer wrote, in pertinent part:

Our company’s need for landscape workers from March until the end of November is seasonal in nature since we cannot perform landscaping services during the winter months in northern Michigan because of climatic conditions. We need additional workers solely to perform landscaping services (mow, cut, water laws, dig holes and trenches, pull and chop weeds, prune, and haul topsoil) during the warm weather months of the year.

The need for these workers is unquestionably temporary in nature as it is impossible to perform this work in the winter. I do not believe the work can be characterized as a peak load need as landscaping work is not performed year round. While we are open in the winter, we employ only about 20 workers during the off-season and about 55 working during the warmer months. The winter workers have distinctly different jobs from the landscapers. They are mechanics, snow shovelers and snow plow truck drivers. The same workers do not perform landscaping.

We seek to employ landscape laborers from March until the end of November as landscaping can be performed during this time and it is the time period during which our competitors landscaping businesses do business. We have always wanted to employ landscape laborers beginning in March, as this is the time when landscaping work begins after the end of winter. Our payroll records (enclosed) show employment of temporary landscape workers from April until November because in past years we have never been able to process applications with the Department of Labor, Immigrants Services and US Consulates in Mexico in time to get the workers to the United States by March. The process takes much more time than the four months in advance of the start date for employment that we are allowed under Department of Labor regulations.

AF 17. Last, the Employer’s response included another copy of the payroll summary report that the Employer submitted with its original application. AF 22.

On March 12, 2009, the CO denied the Employer's application. AF 12-16. The CO provided two bases for his denial. First, the CO found that the Employer "failed to provide any documentation that supports a need for full time, temporary employment for the number of workers requested for the dates of need requested." AF 15. The CO observed that the payroll summary report "fails to show full time employment for temporary workers until" April of 2006 and May of 2007. AF 14. The CO added that the Employer also failed to comply with the RFI by submitting the documents used in preparing the payroll summary report. AF 15. Second, the CO found the Employer's second temporary need statement insufficient. AF 16. The CO explained that the payroll summary report indicates that the Employer maintains a permanent staff of landscape laborers throughout the year and that the Employer has therefore mischaracterized its need as seasonal. AF 15-16. The CO added that the Employer did not comply with the RFI in that it failed to provide "a detailed explanation of the duties to be performed by workers in the occupation . . . during each calendar month for which workers have been requested." AF 16. The Employer's appeal followed.

Discussion

On December 19, 2008, the Department of Labor published new H-2B regulations that became effective on January 18, 2009. *See* 73 Fed. Reg. 78,020 (Dec. 19, 2008). These regulations give employers a right to BALCA review of the CO's determinations on applications for temporary labor certification in fields other than nursing and agriculture. 73 Fed. Reg. 78,020, 78,063 (Dec. 19, 2008). Previously, no such right existed. Rather, the CO's decisions were advisory to United States Citizenship and Immigration Services ("USCIS"), an agency within the Department of Homeland Security, and employers who did not receive certification could continue to pursue visas after submitting countervailing evidence to USCIS. *See* 73 Fed. Reg. 78,045 (Dec. 19, 2008). In a departure from the previous H-2B procedures, the new regulations restrict BALCA's review to the Appeal File prepared by the CO and any legal briefs submitted by the parties. *See* 20 C.F.R. § 655.33(e). Moreover, under the new regulations, an employer must have been granted certification from the Department of Labor before proceeding to USCIS. The TEGL provides the procedures for processing the application at issue in the instant case. *See* 72 Fed. Reg. 38,621 (July 13, 2007).

At the outset, I recognize that Congress caps the number of visas available for these workers, and that USCIS issues them on a first-come, first-served basis. The cap and USCIS's policy create an incentive to apply for H-2B visas as early as possible. The TEGL, Attachment A, Section III.F, however, forbids filing an application with the state workforce agency more than 120 days before the employer's period of need begins. The 120-day rule, the cap, and USCIS's policy together encourage obtaining certification for a period with as early a start date as possible. The risk is obvious: a later start date precludes an early filing, which jeopardizes the employer's chances of obtaining timely visas for temporary workers. Understandably, the CO must be vigilant against employers who might claim to need workers earlier than they actually do.

Insufficient Documentation

The TEGL, Attachment A, Sections III.D.3 and .4, require the employer to provide a detailed statement with supporting documentation and evidence in order to establish a temporary need for the specific job opportunity, number of workers, and dates requested. Likewise, the TEGL No. 21-06,

Attachment A, Section V.B, permits the CO to issue one RFI to permit the employer to correct any deficiencies or provide additional documentation or evidence. In Attachment A, Section II, the TEGL requires that “[t]he employer’s need for temporary non-agricultural services or labor must be justified to the NPC Certifying Officer under one of the following standards: (1) a one-time occurrence, (2) a seasonal need, (3) a peakload need, or (4) an intermittent need.” In this case, the Employer has attempted to establish a seasonal temporary need for landscape workers. The TEGL, Attachment A, Section II.D.3 , describes the showing necessary for establishing a seasonal need as follows:

The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner’s permanent employees.

Based on the documentation the Employer initially provided, the CO reasonably issued the RFI to determine whether the Employer actually has a seasonal need beginning March 1, 2009. Specifically, the payroll summary report indicated that the Employer did not employ temporary landscape laborers until April in both 2006 and 2007. Likewise, the Employer’s original statement of temporary need explained how the Employer’s temporary need arose in April and not March. Since the Employer’s evidence and temporary need statement initially contradicted the dates of need listed in the application, the CO properly issued the RFI.

In the RFI, the CO offered examples of other acceptable forms of documentation that the Employer could submit to support an application for either a seasonal or peakload temporary need (e.g., contracts, invoices, letters of intent). In its response, the Employer instead resubmitted the payroll summary report with an explanation for why the report did not necessarily undermine its request for a March 1, 2009, start date. Specifically, the Employer explained that, despite wanting to employ temporary workers during March of 2006 and 2007, the Employer was not able to complete all of the steps necessary to obtain its foreign workers in time because the Department of Labor requires employers to file their applications no earlier than 120 days before their periods of need begin. While this explanation may be true, the Employer still has failed to provide any documentation that actually *supports* a March 1, 2009, start date for temporary landscape laborers. Since the Employer has not complied with the TEGL or with the CO’s RFI by failing to provide documentation that it requires temporary workers to perform landscaping work beginning March 1, 2009, I will affirm the CO’s denial.

Proper Standard of Temporary Need

In his RFI and denial letter, the CO suggested that the Employer may have applied for certification under the wrong temporary-need theory. The payroll summary report purports to provide data for permanent and temporary landscape laborers only. The CO opined that, as the report states that the Employer has permanent landscape laborers on its staff, the Employer should have attempted to establish a peakload temporary need instead. To establish a peakload need, the Employer must show that

(1) it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand, and (2) the temporary additions to staff will not become a part of the petitioner's regular operation.

The TEGL, Attachment A, Section II.D.3 (emphasis in original). ETA has suggested that a landscaping business has a peakload need if it requires more workers every spring, summer, and fall than it does during the winter. ETA, *Frequently Asked Questions: H2-B Processing (Round 1)* at 4, http://www.foreignlaborcert.doleta.gov/pdf/h2b_faqs_round1.pdf. ETA has also explained that a landscaping business that completely shuts down during the winter, and therefore presumably has no permanent landscape laborers, has a seasonal need. *Id.* In the instant case, the Employer claimed that it does not perform any landscaping services during the winter but contradictorily provided documentation indicating that it employs permanent landscape laborers year-round. Based on the Employer's statements, however, it seems that the payroll summary report may actually contain data for employees in occupations other than landscaping (e.g., mechanics, snow plow drivers, office personnel), in which case the Employer may have appropriately claimed a seasonal need.³ Had the Employer complied with the CO's request to submit the documents used in generating the payroll summary report, the Employer might have resolved some of this confusion. Note also that the TEGL, Attachment A, Section D.4.c, expressly requires that an employer provide these payroll documents upon the CO's request. While I base my decision to affirm solely on the Employer's failure to provide sufficient documentation for the period of need requested, I mention the need-standard issue only to emphasize the importance of complying fully with the CO's RFI. Generally, noncompliance with an RFI seriously endangers an employer's chances of securing reversal on appeal. In the instant case, it proved fatal to the Employer's appeal.

Accordingly, it is hereby **ORDERED** that the Certifying Officer's determination is **AFFIRMED**.

For the Board:

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JOHN M. VITTON
Chief Administrative Law Judge

³ The payroll summary report is also curious in that, during both years, the number of "permanent" landscape laborers more than doubled by late-spring only to return to January levels by December. *See* AF 47. It appears that the Employer misidentified its temporary domestic landscape laborers as "permanent" employees when preparing the report. Given the fact that the Employer only requested 20 temporary alien workers, this explanation would be consistent with the Employer's statement that, "during the warmer months," its staff increases to 55 workers, only six of whom are mechanics or office workers. *See* AF 46-47. Beyond complying with the RFI, the Employer would have benefited by using precise terminology when completing its application and preparing the supportive documentation.